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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Austin Flake and Logan Flake, husband and wife,

10 Plaintiffs,

11 v.

12 Joseph Michael Arpaio, in his official
13 capacity as Sheriff of the Maricopa County
14 Sheriff's Office, and in his personal
15 capacity along with his wife Ava J. Arpaio;
16 Maricopa County, a political subdivision of
the State of Arizona; Marie Trombi, in her
personal capacity,

17 Defendants.

No. CV-15-01132-PHX-NVW

ORDER

18 Before the Court are the parties' responses to its order to show cause pursuant to
19 Federal Rule of Civil Procedure 56(f). (Docs. 305, 309, 311.) For the reasons below,
20 summary judgment will be granted in favor of Defendant Marie Trombi.

21 **I. BACKGROUND**

22 **A. Factual Background**

23 Plaintiffs Austin Flake and Logan Brown (collectively, the "Flakes") sued
24 Defendants Joseph Michael Arpaio ("Arpaio"), Maricopa County (the "County"), and
25 Marie Trombi ("Trombi") under 42 U.S.C. § 1983 and Arizona state tort law. (Doc.
101.)

26 Logan's parents, Jesse and MaLeisa Hughes, ran a dog kenneling business. (Doc.
27 134 at 1.) The kennel was a small, air-conditioned room, roughly nine by twelve feet in
28 size, attached to the Hugheses' home. (*Id.* at 2.)

1 When the Hugheses went out of town in June of 2014, the Flakes watched the
2 dogs. (*Id.* at 1-2.) The Flakes stayed in the main house, which had its own air
3 conditioning system. (*Id.* at 2.) Although the “first five days passed without incident,” at
4 around 5:30 a.m. on June 20, 2017, Austin went to the kennel and “found the room so hot
5 that the twenty-one dogs had either died or grown seriously ill.” (*Id.*)

6 The Maricopa County Sheriff’s Office, then led by Arpaio, promised a full
7 investigation of the incident. (*Id.* at 2.) Trombi, a deputy sheriff, was the appointed
8 investigator. (*Id.* at 4.) She repeatedly briefed Arpaio on the investigation’s status. (*Id.*)
9 As part of the investigation, an electrical engineer prepared a report concluding the air
10 conditioning unit was “inadequate and improperly configured” but had been operating all
11 night. (*Id.* at 3-4.)

12 The investigation progressed for several months. On September 9, 2014, Arpaio
13 held a twenty-two minute press conference where he announced he was recommending
14 the Hugheses and Flakes be charged with twenty-one felony counts and six misdemeanor
15 counts of animal cruelty. (*Id.*)

16 On October 10, 2014, a grand jury indicted the Hugheses and the Flakes on those
17 charges. (*Id.* at 4-5.) Trombi had testified before the grand jury. (*Id.* at 5.) She was
18 specifically questioned about whether the air conditioning was on and answered that,
19 according to the electrical records, it was on all night. (*Id.*) The Flakes were not
20 arrested, but they were prevented from leaving the State of Arizona without permission,
21 which was granted when requested. (*Id.*; Doc. 309-2, Ex. B at 69, 76.) They were also
22 prohibited from having “custody or control over another person’s animal/pet.” (Doc. 134
23 at 5.)

24 On December 2, 2014, the Flakes moved to “return the case to the grand jury in
25 light of ‘material misrepresentations and omissions’ in Trombi’s testimony.” (*Id.*) “It
26 turned out that the electric company records did show the air conditioner may have
27 failed.” (*Id.*) Three weeks later, the County Attorney’s Office voluntarily dismissed the
28 case against the Flakes. (*Id.*) The County Attorney told the press that the original theory

1 of the case, as presented to the grand jury, did not take into account possible problems
2 with the air conditioning unit. (*Id.*)

3 **B. This Lawsuit Through Trial**

4 On June 19, 2015, the Flakes filed this lawsuit, alleging malicious prosecution
5 under state and federal law, defamation, false light invasion of privacy, and First
6 Amendment retaliation. (*Id.* at 6.) After discovery closed, Defendants moved for
7 summary judgment. (Doc. 107.) The Flakes moved for partial summary judgment.
8 (Doc. 114.) The Court granted summary judgment to Defendants on the defamation,
9 false light invasion of privacy, and First Amendment retaliation claims. (Doc. 134 at 19-
10 20.)

11 The only other claim was malicious prosecution. The Flakes had pleaded
12 malicious prosecution against Arpaio under state law and under federal law, 42 U.S.C.
13 § 1983. They failed to meet Arizona’s notice-of-claims deadline against Trombi, so they
14 pleaded malicious prosecution against her only under § 1983.

15 The Court granted summary judgment to Trombi for the § 1983 malicious
16 prosecution claim. The Court found, at the time, that no reasonable finder of fact could
17 conclude that Trombi “lied to or materially misled the prosecutors.” (*Id.* at 9.) “At most
18 the evidence in the record show[ed] she misunderstood the law of animal cruelty but
19 pursued charges against the Flakes in good faith. It [was] not inferable that she knew
20 what she said was false as opposed to mistaken or incomplete.” (*Id.*)

21 In addition, the Flakes failed to offer any evidence that Trombi or Arpaio intended
22 to deny them a specific constitutional right. (*Id.* at 12-13.) The intent-to-deny element is
23 necessary under § 1983, so the federal malicious prosecution claims against both Trombi
24 and Arpaio failed.

25 The intent-to-deny element, however, is not part of the state-law tort, and the
26 Court found there was enough evidence for the state-law malicious prosecution claim
27 against Arpaio to proceed. A reasonable finder of fact could have concluded from
28 Arpaio’s statements to the press “that prosecutors brought charges because of the

1 pressure from Arpaio and the representations he and his office made about the
2 investigation.” (*Id.* at 9.) The Court also determined, as a matter of law, that the
3 prosecutors did not have probable cause to charge the Flakes. (*Id.* at 11.) No reasonable
4 person could have concluded that the Flakes, as the statute required, “knowingly or
5 intentionally” subjected the dogs “to cruel neglect or abandonment.” (*Id.* at 12.) The
6 Court therefore granted partial summary judgment to the Flakes on that element. (*Id.* at
7 21.)

8 The action thus proceeded to trial only on the state-law malicious prosecution
9 claim against Arpaio and the County. On December 15, 2017, the jury returned a general
10 verdict of no liability for the defendants. (Doc. 187.)

11 During the trial, new evidence surfaced as to Trombi. Graphs prepared by the
12 Sheriff’s Office and the County Attorney’s Office suggested the air conditioning unit
13 failed during the night. Trombi had seen the graphs prior to her grand jury testimony.
14 Thus, a reasonable finder of fact could have concluded that Trombi knew what she said to
15 the grand jury was false or misleading. Accordingly, the Court vacated the portion of its
16 order granting summary judgment to Trombi on the § 1983 malicious prosecution claim.
17 (Doc. 182.)

18 **C. Events Following the Trial**

19 In § 1983 malicious prosecution actions, a plaintiff must prove “that the
20 defendants prosecuted her with malice and without probable cause, and that they did so
21 for the purpose of denying her equal protection or another specific constitutional right.”
22 *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). In the Court’s
23 discretion, it would have been unfair in reconsidering Trombi’s Motion for Summary
24 Judgment to rely only on the lack of intent-to-deny evidence from the stale, pre-trial
25 record. The Court therefore allowed limited additional discovery and set a firm trial date
26 of July 9, 2018, for the claim against Trombi. (Docs. 203, 218, 281.)

27 At the June 7, 2018 final pretrial conference, the Flakes failed to produce jury
28 instructions that identified the specific constitutional right Trombi purposefully violated.

1 The Court ordered them to submit “an instruction on the substantive law of the
2 constitutional right” they intended to prove satisfied that element of the claim. (Doc. 288
3 at 2.) In response, they provided the Court with “the unsupported assertion that the
4 Fourteenth Amendment guarantees a due process right to be free from malicious
5 prosecution.” (Doc. 291 at 1.) The Court gave the Flakes another chance, ordering them
6 to produce “a brief with legal authorities establishing the existence of their claimed
7 constitutional right.” (*Id.* at 1-2.)

8 The Court held a further final pretrial conference on July 6, 2018, to discuss the
9 briefing submitted on the issue. (Doc. 303.) In their brief, the Flakes argued that
10 “Trombi’s repeated misrepresentations and omissions to the County Attorney
11 proximately resulted in a deprivation without due process of the Flakes’ liberty interests
12 to travel and engage in an occupation,” namely the ability to care for the pets of third
13 parties. (Doc. 299 at 4.) The Court concluded that the Flakes “still could not identify,
14 before the July 9, 2018 trial date, evidence supporting a cognizable violation of a federal
15 right.” (Doc. 304 at 1.) It then gave notice under Rule 56(f) that it was disposed to grant
16 summary judgment and ordered the Flakes “to show cause why summary judgment
17 should not be entered” in Trombi’s favor. (*Id.*) It required them to submit evidence to a
18 summary judgment standard that Trombi acted with the purpose of depriving the Flakes
19 of the constitutional rights of due process, interstate travel, or gainful employment. (*Id.*
20 at 2.)

21 The Court now considers the evidence submitted and the accompanying brief.
22 (Doc. 305.)

23 **II. ANALYSIS**

24 “After giving notice and a reasonable time to respond, the court may consider
25 summary judgment on its own after identifying for the parties material facts that may not
26 be genuinely in dispute.” Fed. R. Civ. P. 56(f)(3). Summary judgment should be granted
27 if the evidence reveals no genuine dispute about any material fact and the moving party is
28 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that

1 might affect the outcome of the suit under the governing law, and a factual dispute is
2 genuine “if the evidence is such that a reasonable jury could return a verdict for the
3 nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

4 **A. The Flakes Have Failed to Raise a Genuine Issue of Material Fact**
5 **About Whether Trombi Intended to Deprive Them of a Constitutional**
6 **Right**

7 “Section 1983 is not itself a source of substantive rights, but merely provides a
8 method for vindicating federal rights elsewhere conferred. The first step in any such
9 claim is to identify the specific constitutional right allegedly infringed.” *Albright v.*
10 *Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation omitted).

11 The Court ordered the Flakes to produce evidence that Trombi acted with the
12 purpose of depriving them of the constitutional rights of due process, interstate travel, or
13 gainful employment. The sole portion of the Flakes’ brief that is responsive to the
14 Court’s order focuses only on travel restrictions. (Doc. 305 at 10-12.) Travel restrictions
15 in § 1983 cases are analyzed for whether they constituted unlawful seizures under the
16 Fourth Amendment. *See Karam v. City of Burbank*, 352 F.3d 1188, 1193 (9th Cir. 2003).
17 The Court of Appeals has found travel restrictions “de minimus,” and therefore not an
18 unlawful seizure, where (1) the plaintiff was not charged with a felony, (2) the plaintiff
19 was not required to report to anyone, and (3) the plaintiff could obtain the court’s
20 permission to leave the state. *Id.* at 1194.

21 The Flakes were not unlawfully seized. They were released on their own
22 recognizance and were able to seek permission to leave the state—permission they sought
23 and received. (Doc. 309-2, Ex. B at 69, 76.) They were also not required to report to
24 anyone other than for court proceedings. (*Id.* at 69.) Although the Flakes were charged
25 with felonies, that is not dispositive. *See McCabe v. Hart*, 357 F. App’x 151, 153 (9th
26 Cir. 2009) (“The contours of the holding in *Karam* are not entirely defined as to the
27 significance, by itself, of the felony charge. Further, our sister circuits are not in
28 accord.”). As a matter of law, the Flakes suffered no Fourth Amendment violation.

1 Moreover, despite many opportunities, the Flakes still offer no evidence that
2 Trombi acted with the *intent* to deny them any constitutional right, Fourth Amendment or
3 otherwise. Without the purpose or intent to deprive a person of his federal constitutional
4 rights, there is no federal tort. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 919 (9th Cir. 2016)
5 (en banc). Notwithstanding the Flakes’ assertions, the Constitution does not contain a
6 substantive due process right to be free from malicious prosecution. *Albright*, 510 U.S. at
7 273-75. Otherwise, all state-law malicious prosecution claims against a state actor could
8 also be brought in federal court as a federal § 1983 claim.

9 In properly pleaded § 1983 malicious prosecution cases, the plaintiff will point to
10 particular constitutional rights deliberately infringed upon by the defendant—such as the
11 First Amendment right to free speech in an election campaign or the Fourteenth
12 Amendment right to equal protection free from racial animus. *Awabdy v. City of*
13 *Adelanto*, 368 F.3d 1062, 1070-71 (9th Cir. 2004). The Flakes have failed and continue
14 to fail to present any evidence that Trombi intended to infringe upon any such right.

15 For these reasons, the Flakes have not raised a triable issue of fact as to whether
16 Trombi purposefully deprived them of a constitutional right. They cannot prove an
17 element of their § 1983 malicious prosecution claim. Summary judgment must be
18 granted in Trombi’s favor.

19 **B. The Flakes’ Claim of Deliberate Fabrication Is Belated and Prejudicial**

20 The Flakes focus their brief almost entirely on a new cause of action: fabrication
21 of evidence. (Doc. 305 at 2-10.) They even ask for leave to amend to plead the claim.
22 (*Id.* at 9.) The Flakes rely on *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir.
23 2001) (en banc), where the Court of Appeals explained “that there is a clearly established
24 constitutional due process right not to be subjected to criminal charges on the basis of
25 false evidence that was deliberately fabricated by the government.”

26 The Court has already denied the Flakes leave to amend (Doc. 306), but some
27 additional comments are warranted. As a threshold matter, the motion was procedurally
28 flawed. The Flakes styled their motion as one to conform to the evidence under Federal

1 Rule of Civil Procedure 15. (Doc. 305 at 9.) “There has been no trial as against
2 Defendant Trombi to which the pleadings could be conformed.” (Doc. 306 at 2 (citing
3 Fed. R. Civ. P. 15(b)(2).). The Flakes also failed to attach a proposed amended
4 complaint, in violation of the Local Rules. LRCiv 15.1(a).

5 But even if the Flakes had presented a proper motion to amend the complaint, the
6 Court would have denied it. “Five factors are taken into account to assess the propriety
7 of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party,
8 futility of amendment, and whether the plaintiff has previously amended the complaint.”
9 *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Those factors weigh strongly
10 against allowing amendment here. If the Flakes believe Trombi fabricated evidence, they
11 should have so alleged earlier. Nothing explains the Flakes’ failure to attempt to plead a
12 *Devereaux* claim before the eve of trial.

13 The proposed fourth amendment is highly prejudicial to Trombi. Discovery was
14 not conducted with deliberate fabrication in mind, and rebutting deliberate fabrication
15 would require different evidence and reopening discovery. The Court of Appeals has
16 stated, in dictum, that deliberate fabrication is “similar to the tort of malicious
17 prosecution,” but it has not held that they are the same. *Bradford v. Scherschligt*, 803
18 F.3d 382, 388 (9th Cir. 2015) (citing *Awabdy*, 368 F.3d at 1066). Nor should the torts be
19 construed as the same, as they have distinct elements and lines of cases. *Compare*
20 *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (“To prevail on a § 1983 claim of
21 deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately
22 fabricated evidence and (2) the deliberate fabrication caused the plaintiff’s deprivation of
23 liberty.”), *with Freeman*, 68 F.3d at 1189 (Section 1983 malicious prosecution actions
24 require a plaintiff to prove “that the defendants prosecuted her with malice and without
25 probable cause, and that they did so for the purpose of denying her equal protection or
26 another specific constitutional right.”).

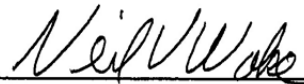
27 The cases the Flakes cite do not override the *Johnson* amended-pleading factors—
28 they apply them. *See, e.g., Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024,

1 1038 n.4 (9th Cir. 2016); *Desertrain v. City of L.A.*, 754 F.3d 1147, 1154-55 (9th Cir.
2 2014). Further, all of the cases cited address grants of leave to amend at the summary
3 judgment stage, well in advance of trial, not on the eve of trial. *Johnson* makes clear that
4 the Court has discretion regarding whether to allow leave to amend, 356 F.3d at 1077,
5 and the Court's discretion is not to allow the Flakes' new, belated claim.

6 IT IS THEREFORE ORDERED that the Clerk of Court enter judgment in favor of
7 Defendant Marie Trombi against Plaintiffs Austin Flake and Logan Brown and that
8 Plaintiffs take nothing.

9 All claims against all parties having been disposed of, the Clerk shall terminate
10 this case.

11 Dated this 6th day of August, 2018.

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14 Neil V. Wake
15 Senior United States District Judge
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